STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 27, 2010
v	No. 289901 Ingham Circuit Court
ROBIN T. WOOD, Defendant-Appellant.	LC Nos. 07-000446-FC; 07-000541-FC

Before: FORT HOOD, P.J., and BORRELLO and STEPHENS, JJ.

PER CURIAM.

Following a joint jury trial involving separate felony informations, defendant was convicted of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (victim under the age of 13), and two counts of second-degree criminal sexual conduct (CSC II) (victim under the age of 13), MCL 750.520c. Defendant filed separate appeals as of right, which were consolidated for this Court's review. We affirm.

A. Joinder

Defendant was charged with criminal sexual conduct involving three complainants in two separate felony informations. Prior to trial, plaintiff filed a motion to join the offenses contained in the two informations into one consolidated trial. Over defendant's objection, the trial court granted plaintiff's motion. In doing so, the trial court concluded that the offenses contained in the informations were "related," and that defendant would not be prejudiced by the consolidation of the trials. We hold that the trial court did not err.

Whether joinder is permissible presents a mixed question of law and fact, which we review de novo and for clear error, respectively. *People v Williams*, 483 Mich 226, 231; 769 NW2d 605. However, we review for an abuse of discretion a trial court's ultimate decision to grant or deny a motion for joinder. MCR 6.120(B); *People v Duranseau*, 221 Mich App 204, 208; 561 NW2d 111 (1997). The interpretation of a court rule is reviewed de novo. *Williams*, 483 Mich at 231.

MCR 6.120(B) provides in relevant part that:

> [O]n the motion of a party, . . . the court may join offenses charged in two or more informations or indictments against a single defendant . . . when

appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense.

(1) Joinder is appropriate if the offenses are related. For purposes of this rule, offenses are related if they are based on

(a) the same conduct or transaction, or

(b) a series of connected acts, or

(c) a series of acts constituting parts of a single scheme or plan.

The plain language of MCR 6.210(B) permits joinder if the offenses charged in separate informations or indictments against a single defendant are "related." The rule provides three bases upon which a court can find that joinder is appropriate. We agree with the trial court's finding that the offenses contained in the felony informations were part of a series of acts constituting parts of a single scheme or plan. In both cases, the alleged sexual abuse occurred at defendant's home, which was also the location of his wife's daycare where he worked as an assistant. It is undisputed that defendant was either a caregiver or authority figure for each complainant. The complainants' testimony suggested that defendant used the status of his relationship with them as a means to perpetrate the sexual abuse. In light of these facts, we hold that the trial court did not err when it ruled that the offenses were "related" within the meaning of MCR 6.120(B). Accordingly, the trial court did not abuse its discretion when it consolidated the trials in these cases.

B. Dr. Barclay's Expert Testimony

Prior to trial, the trial court granted plaintiff's motion to exclude the testimony of Dr. Barclay, a psychologist licensed in Michigan, pursuant to MRE 702. Dr. Barclay proposed to testify at trial that, as a psychologist, he was familiar with and knowledgeable of literature and research in the field of psychology pertaining to a theory called false memory in the context of sexual assault cases. Dr. Barclay explained that the false memory theory suggests that the manner in which an interview is conducted, the status of the person conducting the interview, and the age of the person being interviewed, otherwise known as demand characteristics, can cause an alleged victim of a sexual assault to honestly believe that he or she had been sexually assaulted even when he or she had not been assaulted. According to Dr. Barclay, children, especially young children, are more susceptible to suggestion that they had been sexually assaulted because such situations create a kind of hysteria, whereby the parents are anxious to find out if their child had been assaulted and the children, in response to the created pressure, are more likely to make false allegations of sexual abuse. Dr. Barclay proposed to testify that false memory and demand characteristics might have influenced the complainants' allegations against defendant.

The trial court excluded Dr. Barclay's testimony pursuant to MRE 702 on the ground that it was not based on reliable methodology and, therefore, was unreliable. On appeal, defendant argues that the trial court erroneously excluded Dr. Barclay's testimony. We disagree.

The gatekeeper function requires trial courts to determine whether an expert's opinions and conclusions are reliable. MRE 702; *People v Dobek*, 274 Mich App 58, 94; 732 NW2d 546 (2007). "Expert testimony may be excluded when it is based on assumptions that do not comport with the established facts or when it is derived from unreliable and untrustworthy scientific data." *Dobek*, 274 Mich App 94. In exercising the gatekeeper function, the courts must exclude "junk science."

> MRE 702 mandates a search inquiry, not just of the data underlying expert testimony, but also of the manner in which the expert interprets and extrapolates from those data. Thus, it is insufficient for the proponent of expert opinion merely to show that the opinion rests on data viewed as legitimate in the context of a particular area of expertise (such as medicine). The proponent must also show that any opinion based on those data expresses conclusions reached through reliable principles and methodology. [*Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 782; 685 NW2d 391 (2004).]

Although Dr. Barclay's opinions rested on facts and data relied upon by psychologists in his field, he admitted on cross-examination that there was not an established methodology for the type of review he did in the instant case. Indeed, he admitted that any opinion that demand characteristics affected the complainants would have been conjecture. Moreover, Dr. Barclay testified that the police followed the established forensic protocol when they interviewed the complainants, and that he saw no evidence that the police directly coerced the complainants into making allegations that defendant sexually assaulted them.

C. *Crawford v Washington*[1] Violation

Defendant argues that his Sixth Amendment Right to confront witnesses was violated when the trial court erroneously allowed Stephen R. Guertin, M.D., to testify about hearsay statements made by two of the complainants. We disagree.

The admissibility of evidence is generally reviewed for an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). However, when the admission of evidence involves a preserved constitutional claim, the issue is reviewed de novo. *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003). But unpreserved issues are reviewed for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 13 (1999).

The Confrontation Clause of the Sixth Amendment to the United States Constitution guarantees criminal defendants a right to confront witnesses who testify against them. US Const, Amend VI. Interpreting the meaning and scope of the Confrontation Clause, the United States Supreme Court has held that testimonial hearsay from a declarant who does not appear for cross-examination at trial is not admissible against a criminal defendant to prove the truth of the matter asserted unless the declarant is unavailable and the defendant had the opportunity to cross-

[1] 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

examine the declarant. *Crawford v Washington*, 541 US 36, 59, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004). However, "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." *Id*. at 59 n 9.

It is undisputed that the statements of the two complainants' statements, about which Dr. Guertin testified, constituted testimonial hearsay. Nevertheless, the trial court did not abuse its discretion when it allowed Dr. Guertin to testify about the statements. The lower court record reveals that both complainants testified at trial. Thus, defendant had the opportunity to, and did in fact, cross-examine the complainants. For that reason, there was no *Crawford* violation.

In the alternative, defendant argues that because Dr. Guertin's testimony regarding the complainants' hearsay statements could only have been admitted under MRE 803A and were not admissible under that hearsay rule, the testimony was improperly admitted. Although we agree with defendant that Dr. Guertin's testimony regarding the complainants' hearsay statements was not admissible under MRE 803A, defendant is not entitled to relief on this issue because the testimony was admitted on different, proper grounds.

Contrary to defendant's argument, the trial court admitted Dr. Guertin's testimony regarding the hearsay statements under MRE 803(4). Dr. Guertin is a licensed physician who is board certified in pediatrics and pediatric intensive care. He was admitted as an expert in the field of pediatrics and child sexual assault evaluations at trial. Due to his expertise in the area of child sexual assault evaluations, two of the complainants were referred to him for evaluation to determine whether they had been sexually assaulted. Dr. Guertin testified at trial regarding the methods he used to conduct a child sexual assault evaluation, which included a pre-examination/medical interview whereby he asks the child open-ended, broad questions to ascertain whether the child understands why he or she is being interviewed. Dr. Guertin testified that when dealing with prepubescent children, like the complainants in this case, the interview is an important part of his examination because the sexual abuse suffered might not involve a physical injury. And, in those cases, the information obtained during the pre-examination/medical interview is crucial to him being able to determine whether the child had been sexually assaulted. Dr. Guertin obtained the disputed testimony from the complainants during their pre-examination/medical interviews. Thus, we find that the hearsay statements were properly admitted under MRE 803(4).

Defendant also argues that Dr. Guertin's testimony regarding the hearsay statements should have been excluded because any relevance of the testimony was substantially outweighed by the risk of undue prejudice. Defendant has failed to properly develop this argument for appeal. "'An party appellant may not merely announce his position and leave it to this Court to discover and rationalize the [bases] for his claims, nor may he give only cursory treatment (of an issue) with little or no citation of supporting authority.'" *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004), quoting *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001). In any event, even if defendant is correct, because the complainants testified at trial, he cannot show that, had Dr. Guertin's testimony been excluded, the outcome of trial would likely have been any different.

D. Impeachment Testimony

Defendant argues that the trial court abused its discretion when it prevented him from introducing testimony to attack the character of one of the complainants for truthfulness pursuant to MRE 608. Defendant argues that because the proposed testimony was admissible as either reputation or opinion evidence, the trial court abused its discretion when it excluded the testimony. We disagree.

MRE 608(a) provides that a party may introduce reputation or opinion evidence to impeach a witness's character for truthfulness. We agree with the trial court's finding that the proposed testimony was neither reputation nor opinion evidence, but rather testimony regarding specific instances in which the witnesses believed the complainant had lied to them. Because neither instance is evidence of a conviction of a crime subject to MRE 609, the testimony would have only been admissible during the cross-examination of the complainant. MRE 608(b); *People v Brownridge*, 459 Mich 456, 463; 591 NW2d 26 (1999). Defendant did not attempt to elicit the proposed testimony during cross-examination of the complainant. Therefore, the trial court properly excluded the testimony pursuant to MRE 608(b). *Brownridge*, 459 Mich at 463.

E. Challenge to the Great Weight of the Evidence

Defendant moved below for a new trial on the ground that the jury's verdict convicting him of two counts of CSC I was against the great weight of the evidence. On appeal, he claims the trial court abused its discretion when it denied the motion. We disagree.

An appellate court reviews a trial court's decision to grant or deny a new trial for an abuse of discretion. *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). A new trial is warranted "only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand." *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998). A grant of a new trial because the verdict was against the great weight of the evidence is disfavored, and the jury's verdict should not be set aside if there is competent evidence to support it. *Id*. at 639, 642. When the jury is presented with conflicting evidence, credibility questions should be left for the jury to decide. *Id*. at 642-643.

In the instant case, there was competent evidence to support the jury's verdict. The offense of CSC I of a victim under age 13 requires proof that the defendant engaged in sexual penetration of a person less than 13 years of age. MCL 750.520b(1)(a). The complainant for whom defendant's CSC I convictions stem testified that a man named "Poppa Robin"[2] who lived at the daycare put his finger in her "privacy" (vagina) and her bottom. The complainant testified that she was four-years-old at the time. This evidence was sufficient to convict defendant of the two counts of CSC I. *Lemmon*, 456 Mich at 627. That the complainant might have changed her story regarding the sexual abuse several times or that her parents allowed her to return to the daycare after they learned of the sexual abuse goes toward the weight and credibility to be accorded the complainant's testimony. Credibility issues are left for the trier of fact to resolve. *Id*. at 642-643. The jury was free to accept the complainant's version of events and reject defendant's.

[2] It is undisputed that the children at the daycare called defendant "Poppa Robin."

F. Ineffective Assistance of Counsel

Defendant argues that his trial counsel's failure to: (1) impeach the complainants' credibility on cross-examination; (2) develop testimony regarding defendant's good character; (3) object when plaintiff introduction testimony that defendant had washed a young child's bottom at the daycare; (4) present adequate character witnesses; and (5) object to the amendment of the felony information for docket number 07-000446-FC deprived him of the effective assistance of counsel. We disagree.

Because defendant failed to raise this issue in a motion for a new trial or motion for a *Ginther*[3] evidentiary hearing, we review the claims for mistakes apparent on the record.

The right to counsel is guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20. The right to counsel is the right to have counsel effectively assist in the presentation of one's case. *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). Because effective counsel is presumed, a defendant who challenges his counsel's assistance bears a heavy burden of overcoming that presumption. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). To succeed, a defendant must show (1) trial counsel's actions fell below that of a reasonably competent attorney when objectively viewed and (2) but for trial counsel's unreasonable conduct, there was a reasonable probability the outcome of the trial would have been different. *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

Attorneys have wide discretion in matters of trial strategy. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). The decision to raise objections to procedure or evidence presented at trial can be sound trial strategy. *People v Unger*, 278 Mich App 210, 242, 253; 749 NW2d 272 (2008). Similarly, the decisions concerning whether to call or question witnesses and which evidence to present are matters of trial strategy. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). The failure to call witnesses or present evidence will be deemed ineffective only if the failure to do so deprives the defendant of a substantial defense. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). A substantial defense is one that might have made a difference in the outcome of the trial. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996).

Contrary to defendant's argument, the record reflects that his trial counsel questioned each complainant on cross-examination about specific details of the day the sexual abuse occurred in an effort to attack their credibility. Defendant does not provide this Court with additional questions that his trial counsel should have asked. Also, the record reflects that defendant's testimony that he had washed a young child's bottom at the daycare was elicited during direct examination, not cross-examination as defendant alleges. Thus, there was not a basis for defendant's trial counsel to object.

[3] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Defendant is not entitled to relief on his remaining arguments. It is not plain that defendant's trial counsel was ineffective for failing to develop testimony regarding defendant's good character. Having reviewed the record, we hold that the proffered evidence would not have corroborated defendant's testimony that he did not sexually assault the complainants. This is especially true regarding his claim that he could not have sexually assaulted the complainants because he had a "grandfatherly people-person way of patting shoulders [and] rubbing backs." Attorneys are not required to develop testimony that will not support the defendant's theory. See *People v Bass (After Remand)*, 247 Mich App 385, 391-393; 636 NW2d 781 (2001). In addition, it is not plain that defense counsel's failure to call character witnesses at trial deprived defendant of the effective assistance of counsel. Defendant has not provided this Court with the names of the character witnesses his trial counsel should have called or with the substance of the testimony that they would have presented at trial. Nor has defendant presented any evidence that his trial counsel knew about the existence of these alleged character witnesses prior to trial and the corroborative nature of their testimony, but failed to call them.

Lastly, a review of the record reveals that defendant suffered no prejudice by defense counsel's acquiescence to the amendment of the felony information for docket number 07-000446-FC.

G. Fair and Impartial Jury

Defendant argues that he was deprived of his right to a fair and impartial jury when several jurors repeatedly discussed the evidence and expressed an opinion regarding his guilt despite the trial court's instruction not to do so prior to deliberations. Defendant argues that, as a result of the juror's misconduct, there was an atmosphere of guilt, which stifled a fair deliberation process. Thus, he argues that the trial court abused its discretion when it denied his motion for a new trial. We disagree.

Criminal defendants have a right to be tried by a fair and impartial jury. *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997). As a rule, juror testimony and affidavits are not admissible to impeach a jury's verdict. *Id*.; *People v Fletcher*, 260 Mich App 531, 539; 679 NW2d 127 (2004). The only recognized exception to the rule is when the party challenging the jury verdict can establish that the verdict was affected by extraneous influences. *Fletcher*, 260 Mich App at 539. A court may not scrutinize the jury's deliberative process where the alleged misconduct relates only to matters that are inherent in the deliberative process. *Id.* at 540. In other words, "[a] jury verdict may be challenged on the basis of juror misconduct only when the verdict is influenced by matters unrelated to the trial proceedings." *Id*. at 540-541. To prove that he or she was deprived of a fair and impartial jury, the defendant must show that the jury was exposed to extraneous influences, and that the extraneous influences created a "real and substantial possibility that they could have affected the jury's verdict." *Budzyn*, 456 Mich at 88-89.

The alleged extraneous influence in this case is the alleged repeated pre-deliberation discussions by several jurors during the trial despite the trial courts instruction not to do so. While we certainly agree that it is improper for jurors to engage in pre-deliberation discussions, such discussions are inherent in the deliberative process of the jury. See *Budzyn*, 456 Mich at 88. For that reason, defendant has failed to show that the alleged pre-deliberation discussions constituted an extraneous influence. *Fletcher*, 260 Mich App at 540 ("[a]ny conduct, even if

misguided, that is inherent in the deliberative process is not subject to challenge or review"). Even if the alleged misconduct were as defendant alleges, defendant is entitled to relief on this issue because he cannot demonstrate that the misconduct created a real and substantial possibility that they could have affected the jury's verdict. Defendant presented no evidence that the alleged misconduct in any way undermined the jury's ability as a whole to impartially examine the evidence of this case. Defendant failed to present any evidence that the alleged jurors attempted to coerce or intimidate the other jurors into accepting their view of the evidence and of defendant's guilt prior to the close of proofs. Although not a perfect indicator, that the jury was unable to reach a verdict regarding Count 3 in docket number 07-000541-FC is some indication that the alleged misconduct did not affect the jury's verdict. Defendant misconstrues the one affidavit that he provides to support his argument regarding this issue. Contrary to defendant's argument, the affiant did not write that the alleged misconduct created a tenor of guilt, or that she lost her ability to impartially view the evidence because she felt intimidated by the misconduct. Moreover, the record reflects that the affiant was excused from the juror prior to deliberations. Thus, defendant's reliance on the affidavit is misplaced.

Lastly, defendant argues that the pretrial publicity surrounding his arrest was so extensive and inflammatory that it deprived him of his right to a fair and impartial jury. Because defendant did not assert the jury was tainted because of pretrial publicity and, instead, expressed satisfaction with the jury that was impaneled, his requests for relief on the basis of adverse pretrial publicity or a change of venue are waived. See *People v Carter*, 462 Mich 206, 214-219, 612 NW2d 144 (2000); *People v Clark*, 243 Mich App 424, 426; 622 NW2d 344 (2000).

Affirmed.

/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello
/s/ Cynthia Diane Stephens